

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM MAJOR MOORE,

Defendant-Appellant.

UNPUBLISHED

January 13, 2009

No. 280192

Macomb Circuit Court

LC No. 2007-001691-FC

Before: Fort Hood, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529. Defendant was sentenced to 12 to 20 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that the prosecutor denied him a fair trial by referencing his unemployment and financial status during trial. We disagree. When not properly preserved, this Court reviews claims of alleged prosecutorial misconduct for plain error affecting the substantial rights of the defendant.¹ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Pursuant to MRE 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." If evidence is not relevant, it is not admissible. MRE 402. Even if evidence is relevant, it is not admissible if its probative value is outweighed by its prejudicial tendency. MRE 403. As our Supreme Court has stated, "evidence of a defendant's financial condition, because it ordinarily has limited probative value and usually goes to a collateral issue, will often distract rather than aid the jury." *People v Henderson*, 408 Mich 56, 65; 289 NW2d 376 (1980). The Court further explained, "[e]vidence of poverty, dependence

¹ While defendant did object at one point when the prosecutor asked Michael Smith about defendant's employment status, the objection was based on the theory that Smith did not have knowledge on the subject. An objection on one ground is generally not sufficient to preserve an appeal on an alternative ground. *People v Bushard*, 444 Mich 384, 390 n 4; 508 NW2d 745 (1993).

on public welfare, unemployment, underemployment, low paying or marginal employment, is not admissible to show motive.” *Id.* at 66.

The defense argues that under the rules of evidence and the decision in *Henderson*, the evidence at issue was improperly introduced to the jury. We disagree. *Henderson* was clearly concerned with the practice of using a defendant's financial status for the purpose of establishing motive. Motive was not at issue in this case. Rather, the prosecution was trying to establish that a short time after defendant stated that he was going to “hit a lick,” he returned to Smith’s location with cash. Demonstrating that defendant did not have an income flow assisted the prosecution with creating the inference that the robbery was the source of the funds. Defendant's unemployment was therefore relevant. The evidence was also more probative than prejudicial. In *Henderson*, while discussing the sort of evidence at issue, the Court stated, “[i]ts prejudicial impact, though, is high. There is a risk that it will cause jurors to view a defendant as a ‘bad man’ a poor provider, a worthless individual.” *Henderson, supra* at 66. However, the Court in *Henderson* did not merely reference evidence that someone lacked a job. Rather, the Court was discussing “evidence of poverty, dependence on public welfare, unemployment, underemployment [and] low paying or marginal employment.” *Id.* The discussion of defendant's unemployment did not take on a negative or disparaging tone. It was not aimed at, nor did it have the effect of, creating a notion that defendant was a “bad man” or a “worthless individual.” The concerns of prejudice contained in *Henderson* were not present in this case.

Furthermore, defendant cannot establish that the evidence at issue affected his substantial rights under *Carines*. Defendant was identified placing an item, which proved to be a garbage bag, in Doris Elam’s daughter’s garage. The bag contained a coat that was identified by Darlene Knight as the coat worn by the robber. Additionally, Michael Smith identified the coat as defendant's coat and stated that defendant had the coat on at the beginning of the night, but was no longer wearing it after returning from “hitting a lick.” The evidence, while circumstantial, is still strong in favor of defendant's guilt. Therefore, defendant cannot show that the evidence in question impacted the outcome of the proceedings. *Carines, supra* at 763. Consequently, he is not entitled to relief.

Defendant also asserts the prosecution improperly implied that the police were certain of defendant's guilt. “A prosecutor is prohibited from vouching for a witness' credibility or suggesting that the government has some special knowledge that a witness will testify truthfully.” *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Defendant argues that the prosecution was implying that the police were certain of defendant's guilt and that the jury should consequently convict defendant. We fail to see how the statements can be construed in such a way. Defendant questioned certain witnesses about whether forensic testing was done on the physical evidence. The witnesses were not certain, and forensic evidence consequently did not play a role at trial. The prosecution was merely attempting to rebut the implication that the lack of forensic testing represented some sort of failure on the part of law enforcement. Therefore, the prosecution argued that it was unnecessary to test the clothes found in the garage for DNA where one witness saw defendant place an item in the garage and a bag was later discovered in the garage, which contained a coat that two witnesses had previously seen defendant wear. In general, a prosecutor is granted great latitude in his closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). He “is free to argue the evidence and all reasonable inferences from the evidence as it relates to his theory of the case.” *People v*

Gonzalez, 178 Mich App 526, 535; 444 NW2d 228 (1989). The prosecution's argument was consistent with the facts in evidence and his theory of the case. His conduct was not improper.

In addition, the trial court instructed the jury that the comments of the attorneys were not to be considered as evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has not shown any reason to believe that the jury disregarded the trial court's instruction. Consequently, he is not entitled to relief.

Defendant next argues that the trial court erred in denying his motion for a new trial where the verdict was against the great weight of the evidence. We disagree. This Court reviews a denial of a motion for a new trial for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Defendant must show that the evidence preponderates so heavily against the verdict that to allow the verdict to stand would constitute a miscarriage of justice. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

In an appeal based on the great weight of the evidence, a court should rarely grant a new trial when the appeal is based on conflicting testimony or the questionable credibility of witness testimony. *Lemmon, supra* at 643. Only where the testimony of a material witness is inherently implausible, incredible, defies physical reality or has been seriously impeached should a new trial be granted. *Id.* at 643-644. Issues of credibility should typically be decided by the finder of fact. *Id.* at 642-643.

Defendant first asserts that the evidence did not establish that the robber possessed a firearm during the course of the robbery. At trial, Knight testified that while the robber was ordering her to open her register, he was pointing a sock-covered object at her. The object was shaped like a gun. "To constitute armed robbery the robber must be armed with an article which is in fact a dangerous weapon-a gun, knife, bludgeon, etc., or some article harmless in itself, but used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon." *People v Banks*, 454 Mich 469, 473; 563 NW2d 200 (1997) (emphasis added). The only logical conclusion in this case is that the perpetrator was pointing the object at Knight with the intent of creating a fear that he possessed a firearm. The evidence did not preponderate against the verdict regarding the element of the utilization of a weapon during the commission of the robbery.

Defendant also asserts that the verdict was against the great weight of the evidence where the evidence did not establish his identity as the perpetrator. As described above, in an appeal based on the great weight of the evidence, this Court determines whether the testimony of a witness was implausible, defied reality, or was seriously impeached. *Lemmon, supra* at 643-644. Defendant argues that Elam's testimony was contradictory to an extent that it cannot be trusted. Defense counsel asserts that, pursuant to Elam's testimony, she recovered the bag that was placed in the garage and took it to the police on the same day that it was placed in the garage. Elam was not able to specify the date of the events she described. However, Jason Taber testified that Elam delivered the evidence to the police on March 9, 2007, which was the day after the robbery. Defense counsel therefore concludes that the bag was not placed in the garage

until March 9, 2007, which indicates that it must not have been related to the robbery. Consequently, defendant argues the jury improperly concluded that defendant was the robber.

We disagree with defendant's conclusions, which are contingent on leaps of logic. There was some confusion regarding the dates in question. However, that confusion does not lead to the conclusion that Elam's testimony should be disregarded and that the evidence from her garage is unrelated to the crime. There could be several explanations for the apparent discrepancies. Elam may have been forgotten that she actually took the garbage bag to the police the day after it was placed in her garage. The police may have inaccurately recorded the date of the receipt of evidence. A witness cannot be expected to remember every detail of the events she testifies about. While Elam was somewhat uncertain as to specific details, she was sure that she saw defendant place an item in her daughter's garage. The item was a bag that contained a silver and black coat, among other items. Knight identified the coat as the one worn by the robber, and Smith identified the coat as belonging to defendant. The jury's verdict was therefore not based on implausible or unrealistic evidence. Rather, the jury's verdict was the result of sound inferences drawn from many strong pieces of circumstantial evidence. Defendant is not entitled to relief.

Defendant next asserts the trial court erred in denying his motion for directed verdict where the prosecution failed to present sufficient evidence. We disagree. When properly preserved, this Court reviews a trial court's ruling on a motion for directed verdict de novo to determine whether the evidence presented, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the elements of the charged offense were established beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

In order to secure a conviction for armed robbery, the prosecution must prove:

(1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007) (footnote omitted).]

In challenging the sufficiency of evidence, defendant only contests that the prosecution failed to prove the second element of armed robbery. Specifically, defendant appears to argue that the prosecution was required to show that he displayed a weapon or an object that looked like a weapon to Knight *and* that he explicitly threatened her with a weapon. In support of this notion, defendant cites to *Banks*, in which the Court stated:

The victim testified that she thought defendant's accomplice had a weapon of some kind, but that she never saw any article that resembled the weapon, or a bulge under the accomplice's coat that conceivably could have been a weapon, or his hand shaped to look like a weapon. Furthermore, the victim did not testify that

either defendant or his accomplice threatened that the victim would be shot or stabbed with any alleged weapon. The victim's testimony cannot be the basis for an armed robbery conviction. [*Banks, supra*, at 475.]

The quote relied upon by defendant is completely inapposite to the facts of this case. Knight testified that while the perpetrator was demanding she open her register, he was pointing a sock-covered object at her and the object was shaped like a gun. She also testified that the object placed her in fear. While *Banks* highlights that neither the defendant nor his accomplice threatened the victim, the Court did not state that a verbal threat was necessary. Pointing a gun shaped object at someone while wearing a mask and demanding money is universally recognized as threatening behavior. Defendant's argument is completely lacking in merit. The trial court properly denied defendant's motion for a directed verdict as sufficient evidence was presented in support of the charged offense. Defendant is not entitled to relief.

Next, in his standard 4 brief, defendant contends that he was denied the effective assistance of counsel. We disagree. Defendant's claim that he was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). While the trial court's factual findings are reviewed for clear error, the questions of constitutional law are reviewed de novo. *Id.*

In defendant's statement of the issue presented in his standard 4 brief, he implies that counsel was ineffective for a variety of reasons, including a failure to properly cross-examine certain witnesses and a failure to object to the admission of improper evidence. However, in his standard 4 brief, he only argues that counsel was ineffective for failing to object to prosecutorial misconduct and for failing to seek a curative instruction for the misconduct. Defendant's standard 4 brief does describe Knight's testimony regarding her inability to conclude the perpetrator possessed a gun. It also describes Elam's testimony regarding the date the garbage bag was placed in her garage compared to the date she took the bag to the police. However, defendant makes no arguments regarding his attorney's conduct regarding Knight or Elam. As this Court has previously stated in *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001):

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position Failure to brief a question on appeal is tantamount to abandoning it.

This Court therefore concludes that in his standard 4 brief, defendant has abandoned any issue other than whether his attorney was ineffective for failing to object to the prosecutor's argument about defendant's unemployment and for failing to seek a curative instruction.

In order to prevail on an appeal based on ineffective assistance, defendant must establish that his attorney's assistance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that defense counsel's actions were sound trial strategy. *Id.* In order to demonstrate prejudice, defendant must establish that there is a reasonable probability that, but for the mistakes of his attorney, the result of the trial would have

been different. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). The United States Supreme Court has further stated that the proper inquiry is whether, as a result of counsel's performance, the outcome of the trial was fundamentally unfair, unreliable or prejudicial. *Lockhart v Fretwell*, 506 US 364, 369; 113 S Ct 838; 122 L Ed 2d 180 (1993).

Defendant asserts that counsel should have objected to the prosecution's references to defendant's unemployment and financial condition. As stated above, the prosecutor's conduct was not improper. It cannot be said that defense counsel was ineffective for failing to object to the prosecutor's actions, as defense counsel has no obligation to make a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Finally, defendant asserts that the trial errors cumulated to deny him a fair trial. We disagree. A criminal defendant is entitled to relief when the cumulative effect of trial errors denied him a fair trial. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). When determining whether cumulative error denied a defendant a fair trial, this Court only aggregates actual errors. *Bahoda, supra* at 292 n 64. Because we have determined that no errors occurred in defendant's trial, defendant cannot establish that multiple errors cumulated to deny him a fair trial. He is not entitled to relief.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Kurtis T. Wilder

/s/ Stephen L. Borrello